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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re MARIAH N., a Person Coming Under
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

KARLA L.,

Defendant and Appellant.

D049528

(Super. Ct. No. 511865C)

APPEAL from an order of the Superior Court of San Diego County, Peter Riddle,
Judge. (Retired Judge of the San Diego Sup. Ct. assigned by the Chief Justice pursuant
to art. VI, § 6 of the Cal. Const.) Affirmed.

Karla L. appeals an order denying her Welfare and Institutions Code section 388¹ petition in which she requested reunification services in relation to the dependency of her daughter, Mariah N, and vacation of the scheduled section 366.26 hearing. She contends the court abused its discretion by denying her petition because the evidence showed she had made significant and substantial changes since the denial of reunification services, and reunification with her was in Mariah's best interests.

FACTUAL AND PROCEDURAL BACKGROUND

Three-year-old Mariah is Karla's third child. In April 1997 Karla's second child, Adrian L., died at the age of eight months as a result of being severely physically abused by Karla's boyfriend, William M. At the time, the San Diego County Health and Human Services Agency (the Agency) petitioned on behalf of Karla's oldest child, Erica L., under section 300, subdivisions (e) and (f) based on the physical abuse inflicted on Adrian and on the fact Karla left Adrian alone with William after witnessing William abuse him. Karla, who was 16 years old at the time, was not provided with reunification services and Erica was adopted by a relative. Karla was incarcerated at the California Youth Authority (CYA) for three and one-half years and paroled when she was 20 years old.

Karla subsequently gave birth to Mariah and Hector N. In August 2005, she gave birth to her fifth child, Jose N., and tested positive for methamphetamine. The Agency petitioned on Jose's behalf under section 300, subdivisions (b) and (f) based on Karla's

¹ All statutory references are to the Welfare and Institutions Code.

drug use and on her abuse and neglect of Adrian. No reunification services were offered to her in Jose's case.

In August 2005, Mariah and Hector were staying in Mexico with their paternal grandmother. In December 2005, Karla brought Mariah to the United States to visit Jose. The Agency removed Mariah from Karla's custody and petitioned on her behalf under section 300, subdivision (f) based on the abuse and death of Adrian. The court ordered Mariah detained. At Karla's request, the court ordered her to enroll in the Substance Abuse Recovery Management System and ordered liberal, supervised visitation. Also in December, Karla became pregnant with her sixth child. In February and March 2006, she tested positive for methamphetamine and then entered a residential drug treatment program. At the February 2006 jurisdictional hearing, the court found the allegations of the petition regarding Mariah true and ordered Karla to have a psychological evaluation.

In March and April 2006, the court held Mariah's dispositional hearing and a hearing on a section 388 petition in which Karla requested services in Jose's case. The psychologist who performed Karla's psychological evaluation testified he was concerned about her history of violent relationships with men and the fact she had not dealt with the domestic violence she observed as a child. He expressed concern about her tendency to have relationships with people who would harm her children. He said Karla could benefit from services, but if she became overwhelmed by her emotions, a child could be at risk. He said it was a positive sign that she had entered a drug treatment program.

Karla testified that while she was at CYA she had grief therapy, took a victims' awareness class and had some drug abuse treatment. At the time of Adrian's death she

admitted hitting him, but she told her therapist and the psychologist who performed the evaluation that she had not done so, and she testified she had not hit him.

The social worker questioned Karla's credibility. She said Karla minimized her drug use and her involvement with Adrian's death. She testified about Karla's history of relationships with unsuitable men. She said Karla knew of William M.'s criminal record, his drug use and his physical abuse of Adrian, yet she left Adrian alone with him. She testified that Erika and Adrian's father was convicted of sex crimes against Karla, but Karla went to Mexico with him, and after her release from CYA began a relationship with another man with a drug and criminal history. This man fathered Mariah, Hector and Jose. In December 2005, Karla became pregnant by Javier M., whom she met at a drug rehabilitation program.

The court declared Mariah a dependent child, removed her from Karla's custody, placed her in foster care and ordered no reunification services be offered under section 361.5, subdivisions (b)(4), (b)(6) and (b)(11) because no showing had been made that services would be in Mariah's best interests. The court set a section 366.26 hearing.²

On August 24, 2006, Karla petitioned under section 388, requesting reunification services and vacation of the section 366.26 hearing regarding Mariah. She argued she had been in drug treatment since January 2006 and sober since her last positive methamphetamine test in March 2006. She said she was on the second step of a 12-step

² At the same hearing, the court denied Karla's section 388 petition requesting services in Jose's case and terminated Karla's parental rights to Jose.

program, had a sponsor and was attending drug court. She was having therapy and had positive, regular visits with Mariah. The court set the matter for hearing and authorized a bonding study.

The psychologist who conducted the bonding study reported that although Mariah enjoyed visiting with Karla and was talkative, she and Karla did not have reciprocal conversations except when Mariah wanted to fend off Karla's demonstrations of affection or reject her suggestions. She said Mariah referred to both Karla and the foster mother as "mommy," but gave the foster mother her personal belongings and went to her when the session ended. She said it was unclear whether Mariah had internalized Karla as a significant maternal figure, perhaps because she had been with the foster mother for nine months and before that it appeared her grandmothers had assumed a maternal role. She said the findings suggested Mariah would show no immediate negative reactions were contact with Karla terminated.

After the September 2006 hearing, the court denied Karla's section 388 petition.

DISCUSSION

Karla contends the court erred by denying her section 388 petition. She argues she showed significant changed circumstances and providing reunification services would be in Mariah's best interests.

Section 388 provides in part:

"(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside

any order of court previously made or to terminate the jurisdiction of the court [¶] . . . [¶]

"(c) If it appears that the best interests of the child may be promoted by the proposed change of order . . . , the court shall order that a hearing be held"

To gain the relief sought in a section 388 petition, the petitioner must show both a change of circumstances or new evidence and that the change of the previous order is in the child's best interests. (§ 388; Cal. Rules of Court, rule 5.570(c); *In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) "It is not enough for the parent to show *just* a genuine change of circumstances under the statute[;] [t]he parent must [also] show that the undoing of the prior order would be in the best interests of the child." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529.) A petition is liberally construed in favor of its sufficiency. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 461.) The petitioner bears the burden of proof, however, to make both showings. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) A reviewing court will not disturb a court's ruling in a dependency proceeding " ' "unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations]." ' ' " (*In re Stephanie M., supra*, 7 Cal.4th at p. 318, quoting *In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 421.)

A court will not grant a section 388 petition on the basis of circumstances that have not changed, but are only in the process of changing. Granting a petition that alleges circumstances only in the process of changing in the hope that the child and the parent might be able to reunify some time in the future, causing a delay in providing a permanent home to the child, may not support the child's best interests. (*In re Casey D.*

(1999) 70 Cal.App.4th 38, 47.) " "[C]hildhood does not wait for the parent to become adequate." " (Ibid.)

The court did not abuse its discretion in denying Karla's section 388 petition. Although she had shown good progress by participating in therapy, drug abuse treatment and a 12-step program, and had positive visits with Mariah, the court did not err by finding she showed only changing, not changed circumstances.

The problems Karla was attempting to resolve were long-standing. First was her complicity in the death of her infant son, Adrian. Nearly 10 years earlier, she stood by while her then-boyfriend, William, viciously inflicted physical abuse on Adrian. She left Adrian alone with William, who killed him. There were reports she also hit Adrian. Karla's brother, Jaime L., reported to police he had seen Karla hit Adrian two or three times and believed she hit him on other occasions as well. He told police she hit Adrian "[b]ecause she was a lazy bitch and wouldn't feed him. She wanted the kid to sleep so she would spank him and tell him to go to sleep." Jaime said on the day Adrian died he was at Karla's home and heard Adrian crying as if he had "shortness of breath." Jaime said he picked up Adrian, whose his legs were shaking and body was stiff. Karla left Adrian at home with William and was seen by a neighbor talking with other girls in an alley. Adrian died that evening.

At the time of Adrian's death, Karla told police about William hitting him and covering his face so he would stop crying. She admitted to police that she had spanked Adrian, but said she had not caused his injuries. The juvenile court found true a felony allegation against Karla of willful cruelty to a child with possible injury or death. Other

charges against her--murder, inflicting injury on a child less than eight years old, possession of narcotics and possession of narcotics for sale--were dismissed with *Harvey*³ waivers.

Also, Karla had a history of being involved in relationships with men who were abusive and/or had criminal backgrounds. Karla testified only one of her relationships involved domestic violence, but her therapist testified there was domestic violence in all of her relationships. Karla said William threatened her and was violent with her and Adrian. After she was released from custody in 2000, she began a relationship with the father of Mariah, Hector and Jose. His criminal history included convictions for burglary, petty theft, and possessing a firearm. A short time after Jose was removed from Karla's custody, she met Javier at an NA meeting and became pregnant with her sixth child. In early 2006, Javier was incarcerated for a parole or probation violation.

Another issue facing Karla was her drug abuse history. Karla reported first using marijuana when she was 15. She said she was not using any drugs at the time Adrian died, but, according to her brother, methamphetamine, cocaine and heroin were being sold from her home and she said William was using "a couple of lines" of cocaine every "couple of hours." She said she did not use drugs from 1995 until 2004, but admitted using methamphetamine when she was first pregnant with Jose in late 2004. She said she stopped when she learned she was pregnant, but then used again just before his birth. She said during this time she would leave Mariah and Hector with their grandmother in

³ *People v. Harvey* (1979) 25 Cal.3d 754.

Ensenada, drive to San Diego to use methamphetamine, then return to Ensenada. After Jose was removed in August 2005 and Mariah in December 2005, she tested positive for methamphetamine in February and March 2006. She admitted knowing she was pregnant at the time.

Karla made great strides after her positive drug test in March 2006 by participating in drug treatment and therapy, completing parenting classes and having regular positive visits with Mariah. Her therapist reported she had become more mature and less impulsive, and was developing improved insight. However, her progress was short-lived in comparison with her long history of significant problems, and insufficient time remained in the 18-month reunification period to allow time for Karla to show that she could be a safe parent to Mariah. At the time of the hearing on the section 388 petition in September 2006, it had been nine months since Mariah was removed from Karla's care in December 2005. Her therapist testified Karla needed additional therapy and further work in her drug abuse recovery program and required a 52-week domestic violence program. She testified Karla was making progress with domestic violence issues and said they were working on her impulsivity, choices of men, and lack of boundaries. Her therapist said there was more work to be done. She stated Karla needed more than six months of services and a year would be a reasonable time. Because Karla continued to need significant time to resolve her serious issues, the court did not abuse its discretion by determining she had showed changing, not changed, circumstances.

Further, the court did not abuse its discretion by finding Karla had not shown a modification of the previous order was in Mariah's best interests. In *In re Kimberly F.*,

supra, 56 Cal.App.4th 519, the court listed three factors a court might consider when determining if a child's best interests would be served by granting a section 388 petition: (1) the seriousness of the problem that led to the dependency and the reasons for any continuation of the problem; (2) the strength of the bond between the child to both parent and caretaker; and (3) the degree to which the problem may be removed and the degree to which it has been removed. (*Id.* at p. 532.)

As to the first and third factors, Karla's neglect and involvement in Adrian's death constituted a severe problem. Although Adrian had died many years before, Karla continued to have difficulty with drug abuse, seeking relationships with inappropriate men, and minimizing or denying her problems. The persistence of these difficulties could not be solved within the nine months remaining of the 18-month dependency period. As her therapist testified, Karla needed to continue therapy, complete a 52-week domestic violence class and continue drug rehabilitation. As to the second factor, the strength of the bond between the child and parent and the bond between the child and caretaker, although it was understood that the foster parent could not provide a permanent home for Mariah, the psychologist reported Mariah would experience no immediate negative reactions were contact with Karla terminated. She said it was unclear whether Mariah had internalized Karla as a significant maternal figure.

Moreover, when reunification services have been terminated or were never ordered, the focus is on the needs of the child for permanency and stability, rather than on the parent's interest in the care, custody and companionship of the child. (*In re Angel B.*, *supra*, 97 Cal.App.4th at p. 464.) When a parent has caused the death of a child by his or

her actions or inaction, " the general rule favoring reunification is replaced by a legislative assumption that offering services would be an unwise use of governmental resources. [Citation.]' " (*In re Ethan N.* (2004) 122 Cal.App.4th 55, 65.) Although Karla made good progress in dealing with the enormous issues she faced, the court did not abuse its discretion by finding that granting her section 388 petition to allow her six months of reunification services would not serve Mariah's interests in attaining a permanent and stable home.

The order is affirmed.

McDONALD, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.